IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 907

IN THE MATTER OF
CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY,
Debtor.

DARRAGH A. PARK, AS CHAIRMAN OF A GROUP OF HOLDERS OF ADJUSTMENT MORTGAGE BONDS,
Petitioner,

vs.

GROUP OF INSTITUTIONAL INVESTORS AND MUTUAL SAVINGS BANK GROUP, AND OTHERS,
Respondents.

BRIEF OF GROUP OF INSTITUTIONAL INVESTORS AND MUTUAL SAVINGS BANK GROUP IN OPPOSITION TO PETITION FOR CERTIORARI OF DARRAGH A. PARK, AS CHAIRMAN OF A GROUP OF HOLDERS OF ADJUSTMENT MORTGAGE BONDS.

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Dated February 14, 1945.

THE BUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

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PRELIMINARY STATEMENT.

This brief is filed on behalf of the Group of Institutional Investors, composed of ten life insurance companies, and the Mutual Savings Bank Group, consisting of 99 mutual savings banks, whose members are large holders of bonds of the Debtor. These Groups have been parties to the various proceedings in the courts and before the Interstate Commerce Commission with respect to the reorganization

of the Debtor and, together with the Reconstruction Finance Corporation, were the petitioners in this Court upon whose petition writs of certiorari were granted and the Plan of Reorganization reviewed in this Court, culminating in the decision rendered March 15, 1943, *Group of Institutional Investors, et al.* v. *Chicago, Milwaukee, St. Paul & Pacific Railroad Co.*, 318 U. S. 523.

In that decision this Court reversed in part and affirmed in part the judgment of the Circuit Court of Appeals for the Seventh Circuit (124 Fed. (2d) 754) and directed that the matter be remanded to the District Court for proceedings in conformity with its opinion. In that opinion the Supreme Court approved the Plan of Reorganization of the Milwaukee with the exception of two items as to which it remanded for further action. First, the Supreme Court directed the District Court to determine which of the mortgages affecting the Debtor's property had a first lien upon the so-called "pieces of lines east." On the remand, the District Court adjudicated the liens and its determination required no change in the Plan in this respect. No party has ever objected to that determination. Second, the Supreme Court directed the Interstate Commerce Commission and the District Court to determine what the senior bondholders should receive, in addition to the allotment made to them of inferior securities equal in face amount to their old securities, as equitable compensation for their loss of their senior rights. As to this the Court stated:

> "As we have indicated, the question whether senior creditors have received 'full compensatory treatment' rests in the informed judgment of the Commission and the court. A decision on that issue involves a consideration of the numerous investment features of the old and new securities and a financial analysis of many factors. Our task is ended if there is evidence to support that informed judgment. We are not equipped to exercise it in the first instance. Nor is it our function." (p. 571.)

Except for these two items, the Court approved the Plan, stating:

> "We have considered all other objections to the plan and find them without merit. But for the exceptions we have noted, we conclude that the District Court was justified in approving the plan and that the Circuit Court of Appeals was in error in reversing that judgment." (p. 573.)

Thereafter, the Interstate Commerce Commission, acting on a re-reference by the District Court, held further hearings and issued its second supplemental report approving a Modified Plan of Reorganization for the Milwaukee to conform with the opinion of this Court. Petitions for further modification of the Plan were filed by various parties in interest, and the Interstate Commerce Commission, after considering these petitions, made and certified its third supplemental report and order dated April 10, 1944, wherein it approved the Modified Plan.

The District Court heard objections to the Modified Plan thus certified by the Commission, and by opinion, findings of fact, conclusions of law and decree entered June 30, 1944, approved the Plan as modified by the Commission in conformity with the opinion and mandate of this Court.

Notices of appeal to the Circuit Court of Appeals from the decree thus approving the Modified Plan were filed by the Debtor, the mortgage trustees of the Chicago, Milwaukee and Gary mortgage and the adjustment mortgage, and by the petitioner and another committee representing certain adjustment mortgage bonds. Thereupon the Group of Institutional Investors and the Mutual Savings Bank Group filed a motion in the Court of Appeals to docket and dismiss the appeals on the ground that the controlling issues had been determined by this Court, that the modifications which the Interstate Commerce Commission had made in the Plan and which the District Court had ap-

proved were wholly in conformity with the mandate of this Court and that the appeals presented no issue of substance. Before argument upon the motion to dismiss, the complete record had been filed by the appellants.

Thereupon the Circuit Court of Appeals, after hearing arguments both written and oral, rendered its opinion and order on October 31, 1944, dismissing the appeals. *In re Chicago, M., St. P. & P. R. Co.*, 145 F. (2d) 299.

On January 6, 1945, the Interstate Commerce Commission certified to the District Court the results of the submission of the Modified Plan to the affected creditors for their acceptance or rejection, pursuant to the provision of Section 77. (Certificate dated January 6, 1945, Finance Docket No. 10882.) The Certificate showed:

Class	"Percent of total vote Accepted	Rejected
1. Holders of The Milwaukee and Northern Railroad Company first mortgage bonds	100.00	0
2. Holders of The Milwaukee and Northern Railroad Company consolidated mortgage bonds	99.39 0.54*	0.07
3. Holders of Chicago, Milwaukee and Gary Railway Company first mortgage bonds	93.56	6.44
4. Holders of Chicago, Milwaukee and St. Paul Railway Company general mortgage bonds	99.28 0.68*	0.04
6. Holders of the debtor's fifty-year mortgage bonds	99.25 0.28*	0.47
7. Holders of the debtor's convertible and adjustment mortgage bonds	87.88	12.12

* Acceptance on condition that claim of the Reconstruction Finance Corporation be paid in full with cash as provided for in the approved plan.

Class	"Percent of total vote Accepted	Rejected
21. Reconstruction Finance Corporation, holder of debtor's secured notes	100.00	0
22. Federal Emergency Administration of Public Works, holder of debtor's secured notes (assigned to Reconstruction Finance Corporation)	100.00	0
31. Holders of all other claims, obligations and liabilities not otherwise specifically classified, which have been allowed by the Special Master or the court	99.82	0.18"

The District Court has set a hearing for February 20, 1945 to determine whether the Modified Plan shall be confirmed and to determine the means by which said Plan, if confirmed, shall be put into effect and carried out.

These respondents oppose the granting of a writ of certiorari on the grounds that (1) the Modified Plan conforms strictly to the opinion and mandate of this Court; (2) the informed judgment of the Interstate Commerce Commission and the District Court is supported by the evidence; and (3) the decision below is not in conflict with the decision of any other Circuit.

I.

The Modified Plan Conforms Strictly to the Opinion and Mandate of This Court.

The undisputed fact that the Modified Plan conforms to the opinion and mandate of this Court in 318 U. S. 523 is a conclusive reason, we submit, why the petition for certiorari should be denied.

II.

The Informed Judgment of the Interstate Commerce Commission and the District Court Is Supported by the Evidence.

In its opinion of March 15, 1943 this Court stated that "the question whether senior creditors have received 'full compensatory treatment' rests in the informed judgment of the Commission and the court."[1] The transcript of the further hearings before the Interstate Commerce Commission on the re-reference shows the overwhelming extent to which the modifications made in the Plan to conform it to the mandate of this Court are supported by the evidence. The holding of this Court, therefore, is conclusive: "Our task is ended if there is evidence to support that informed judgment."[2]

In this connection it should be noted that the transcript filed by the petitioner does not contain any of the evidence taken before the District Court at the hearings which resulted in its approval of the Modified Plan. Nor does the transcript contain any of the evidence taken at the hearings before the Interstate Commerce Commission in connection with the original Plan. All of this evidence was filed in the Court of Appeals on September 19, 1944 and was considered by that court in reaching its judgment, the court stating:

> "Subsequent to the filing of the motion to docket and dismiss, the appeals were perfected. The complete record was filed September 19, 1944, so the motion is merely one to dismiss the appeals."[3]

---

[1] *Group of Institutional Investors et al.*, v. *Chicago, Milwaukee, St. Paul & Pacific Railroad Co.*, 318 U. S. 523, 571.

[2] Id.

[3] *In re Chicago, M., St. Paul & P. R. Co.*, 145 Fed. (2d) 299, 301 (C. C. A. 7, October 31, 1944).

With the transcript thus incomplete, it would be presumed that the judgment of the Interstate Commerce Commission and the District Court is supported by evidence, even if the part of the evidence which is included in the transcript filed by the petitioner did not, as it does, fully support the judgment.[1]

III.

The Decision Below Is Not in Conflict With the Decision of Any Other Circuit.

In view of the fact that the Modified Plan conforms to the mandate of this Court, and the informed judgment of the Interstate Commerce Commission and the District Court is supported by the evidence, any conflict with the decision of another Circuit would be unimportant here. But, in any event, there is no conflict. The petitioner merely hopes that some conflict may develop, although he is very indefinite about the possibility. He contends that the decision below might conflict with the decision of the Tenth Circuit, if that court should upset the approved plan for another railroad on a pending appeal, saying that the plans for the two railroads conform in "broad outlines to the same general pattern." (Petition for Certiorari, p. 4.)

The petitioner also refers to the so-called Hobbs bill and the Report of the Judiciary Committee of the House of Representatives thereon and asks whether "the whole subject of reorganization under Section 77 may not fairly be open for reconsideration on the part of this Honorable Court." (p. 8.) Even that bill, however, provides that it shall not apply to pending reorganizations, such as the Milwaukee, where "the plan has been voted on and accepted

[1] *Mississippi Valley Barge Line Co.* v. *United States*, 292 U. S. 283 (1934).

by the requisite percentage of creditors of each class prior to the effective date" thereof.[1]

Neither the asserted possibility of conflict among the Circuits or of new legislation affords any support whatever for the petitioner's request that this Court "preserve the *status quo*" by "abstaining from immediate action". (Petition for Certiorari, p. 8.)

We pray that the petition for certiorari be denied.

Respectfully submitted,

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[1] 78th Congress, 2nd Session, H. Rep. No. 1615, p. 7; 79th Congress, 1st Session, H. Rep. No. 48, p. 7.

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Respondents.

BRIEF OF GROUP OF ADJUSTMENT MORTGAGE BONDHOLDERS IN OPPOSITION TO PETITION.

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STATEMENT.

The other respondents, the Institutional Groups, moved for a disposition of the petition without printing the record, and waived formal service of the petition and record. These respondents likewise waive formal service of the petition and record and request the disposition of the case without printing the record for the reason that this will avoid delay and the pertinent matters appear in printed form in the various official publications.

Opinion Below.

The opinion of the Circuit Court of Appeals appears in 145 F. (2d) 299. The Second and Supplemental Report of the Interstate Commerce Commission appears in 254 I. C. C. 707 and the Third and Supplemental Report of the Commission appears in 257 I. C. C. 233.

REASONS FOR THE DENIAL OF THE PETITION.

These respondents are a group of holders of Adjustment Mortgage Bonds who are opposed to the allowance of the writ at the instance and request of the petitioners who are also holders of Adjustment Mortgage Bonds.

These respondents were the only group which appeared at the hearings before the Interstate Commerce Commission, the District Court, the United States Circuit Court of Appeals, and before this Court, and endeavored to obtain better treatment for the class who owned these bonds. Being dissatisfied with the Plan, they appealed to the United States Circuit Court of Appeals for the Seventh Circuit and were successful in their appeal and obtained a *reversal* (124 F. (2d) 754). This Court reversed the decision below and approved the plan insofar as it affected the class of the Adjustment Mortgage Bonds. It remanded the case in order to allow to some senior creditors additional compensation, which of course had to be at the expense of the class of the Adjustment Mortgage Bonds which was the only junior bond issue which participated in the reorganized company (318 U. S. 523). In order to obtain further benefits for the class, these respondents filed a petition for rehearing and brought to the attention of this Court the changed economic conditions. They attached to the petition three exhibits showing the finan-

cial cash position and improved valuation as reflected by the books and records as of January 30, 1943. This Court, however, denied the rehearing (318 U. S. 803).

After the decision of this Court became final upon the denial of the rehearing, the new group consisting of the petitioners, was organized as a Protective Committee, and this new group now seeks a review of the same subject matter which was presented to this Court by these respondents.

The decision of this Court created a dilemma. On the one hand this Court affirmed the plan which adjudicated and "fixed" the rights of the holders of the Adjustment Mortgage Bonds and their pro rata share under the new capital structure. On the other hand, it held that the senior creditors were entitled to additional compensation, which could only be taken out of the interest allotted to the holders of the Adjustment Mortgage Bonds. This created the puzzle how to pay additional compensation to the senior creditors without changing the capital structure, and at the same time distribute the new securities to the holders of the Adjustment Mortgage Bonds without disturbing their rights under the plan which this Court approved as to them. The problem was solved when the Institutional Groups presented a Modified Plan which was satisfactory to them and without prejudice to the class of the Adjustment Mortgage Bondholders. In substance, it changed the effective date so that in lieu of giving them interest coupons from January 1, 1939, to January 1, 1944, they were given the cash instead, and their new interest will commence January 1, 1944. This in no way changed the position of the holders of the Adjustment Mortgage Bonds, and the respondents seized the opportunity to *support* this plan and participated before the Commission as

well as before the District Court in urging the adoption of this plan. The petition should therefore be denied for the following reasons:

I.

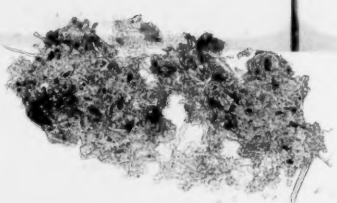
There are no sound reasons for the allowance of the writ.

While several groups were dissatisfied with the approval of the plan and appealed to the United States Circuit Court of Appeals from the order approving the plan, the petitioners were *deserted* by the other appellants.*

The only reason which petitioners urge for the allowance of the writ in their petition (p. 6) is that the decision in the instant case *might* conflict with the decision which *may* be rendered by the Tenth Circuit in another reorganization case which the petitioners hope to be in conflict with the decision in the instant case. We know of no authority for the issuance of a writ based on a prophetic assumption that another court may render a decision which would conflict with the decision sought to be reviewed.

Respondents did not join in the motion of the Institutional Groups to dismiss the appeal in a summary manner because they were of the opinion that some of the other groups were entitled to a review on the merits. Now that the other groups have abided by the decision, we are convinced from a study of the opinion that the

* The appellants who did not join in the petition for the writ are (1) the Debtor, (2) the trustee under the Chicago, Milwaukee & Gary Railroad Company first mortgage, (3) the trustee of the Adjustment Mortgage Bonds, and (4) the committee for holders of the Adjustment Mortgage Bonds represented by Hubert F. Atwater.



Court of Appeals properly dismissed the appeal of the petitioners.

None of the points which were contained in the "statement of points" relied on are even mentioned in the petition. These points were: (1) the alleged error to consider fundamental changes in economic conditions; (2) failure to pay to the Adjustment Mortgage Bondholders 100% of principal and accrued interest; (3) an attempt to unlawfully exercise permanent managerial control by the Interstate Commerce Commission; (4) approval of the plan wherein the capitalization of estimated future earnings is substituted for the elements of value; and (5) failure to meet requirements of sub-sections (b), (c) and (e) of section 77. All of these points were disposed of on the previous appeal, and therefore the Court of Appeals was justified in disposing of the appeal of these petitioners in a summary manner.

1. Point (1), the alleged error in not requiring the Interstate Commerce Commission to hear and consider the proof of fundamental changes in economic conditions, was disposed of by this Court in its original opinion as well as by its denial of the petition for rehearing filed by these respondents (318 U. S. 803). The petition for rehearing *urged* among other things the changed economic conditions now urged by these petitioners. The exhibits attached to the petition have reflected the changed conditions up to and including January 30, 1943. The denial of the petition constituted a determination of the point now urged by the respondents.

A similar contention was urged in the reorganization of the *New York, New Haven & Hartford Railroad Co.* and was held *adversely* by the United States Circuit Court of Appeals for the Second Circuit in its opinion

rendered January 2, 1945, not yet published; Case No. 107. (See C. C. H. Reports, par. 55,083).

In discussing the proposition that the capital structure should be changed by reason of the changed economic conditions, and that the Court erred in not transmitting the case to the Interstate Commerce Commission to consider the effect of these changes, and in holding adversely to the contention, the Second Circuit said:

> "It is for the informed judgment of the Commission rather than for the courts to determine the sufficiency of any cash revenue to meet the uncertainties ahead. Consequently we find no error in the District Court's refusal either to recommit the plan to the Commission or to delay reorganization until the probable extent and duration of war earnings can be more accurately determined, or to issue stock warrants to represent an equity which may develop in the future and does not presently exist. Similar contentions were refused in the *Western Pacific* & *Milwaukee* cases, *supra*. See also *Interstate Commerce Commission* v. *Jersey City*, 322 U. S. 503, 517."

This Court said in the cases cited by the Second Circuit, *I. C. C.* v. *Jersey City*, 222 U. S. 503, 517:

> "We have rejected the plea of railroad stockholders that events subsequent to approval of a reorganization plan of a very similar character to those alleged here, require its return for reconsideration. *Group of Institutional Investors* v. *Chicago, M. St. P. & P. R. Co.*, 318 U. S. 523, 542-44; *Ecker* v. *Western Pac. R. Co.*, 318 U. S. 448, 506-09.
>
> "The rule that petitions are rehearings before administrative bodies are addressed to their own discretion is uniformly accepted and seems to be almost universally applied in other federal courts. *United States ex rel. Maine Potato Growers Assn.* v. *Interstate Commerce Commission*, 88 F. (2d) 780,

784, cert. denied, 300 U. S. 684; *Mississippi Valley Barge Line Co.* v. *United States*, 4 F. Suppl. 748; *Union Stock Yards Co.* v. *United States*, 9 F. Supp. 864, 873; *American Commission Co.* v. *United States*, 11 F. Supp. 965, 972; *R. C. A. Communications* v. *United States*, 43 F. Supp. 851, 858."

2. Point (2), the alleged error of the failure to make provision for 100% of the principal and accrued interest on the Adjustment Mortgage Bonds, was urged by these respondents before this Court in their brief on the previous appeal (pp. 7-16) and was *decided adversely by this Court* when it held that this group was not entitled to the accrued interest (318 U. S. 523, 573).

3. Point (3), the alleged error of the attempt of the Commission to unlawfully exercise permanent managerial control, is wholly devoid of merit because the District Court denied the Commission any right to approve the personnel of the voting trustees, and this was sustained by the Court of Appeals. Petitioners cannot complain from a decision which was *favorable to them*.

4. Point (4), the alleged error in approving the modified plan wherein the capitalization of estimated future earnings is substituted for the elements of value, was fully discussed in the opinion and it was clearly shown that the point is without merit. In disposing of a similar contention in the reorganization of the *New York, New Haven & Hartford Railroad Company*, in the opinion rendered January 2, 1945, by the Second Circuit, *supra*, the Court said:

> "Recent opinions of the Supreme Court in the *Western Pacific* and *Milwaukee* cases, 318 U. S. 448 and 523, make plain that the determination of the amount and character of the capitalization of the re-

> organized railroad and the making of valuations upon which the capitalization depends are functions of the Commission which may be reviewed by the courts only to the limited extent of seeing that the Commission has observed legal standards."

This Court has *passed upon the legal standards* employed by the Commission and the question is no longer debatable.

5. Point (5), the alleged failure to meet requirements of sub-sections (b), (c) and (e) of section 77 was disposed of by this Court when it approved the plan, subject to the remandment for minor modifications.

In view of the review which was limited to the points urged in the "statement of points", the Circuit Court of Appeals properly disposed of the matter when it dismissed the appeal, because all of the matters were adjudicated by this Court.

II.

The additional compensation to the senior creditors was in conformity with the mandate of this Court, and the petitioners who did not appeal on the ground that the additional compensation was excessive are in no position to complain.

Petitioners did not appeal from the original plan which was approved by the District Court. *They were evidently satisfied with that plan.* The modified plan does not change the position of this class and, in fact, they were allotted an *increase* in the common stock. They have no cause to complain.

This Court held that the senior creditors were entitled to additional compensation at the expense of the only

junior class, the Adjustment Mortgage Bonds, who were allotted common stock in exchange for their bonds. No evidence was offered by the petitioners tending to show that the additional compensation allowed to the senior creditors was excessive. They did not urge in their "statement of points" that the evidence did not justify the additional compensation, nor did they urge among their points that the effective date under the modified plan was unfair, unreasonable or prejudicial to the interest of this class. While they complain in their Brief of the effective date (p. 7) it is not mentioned in their "statement of points" nor is it mentioned in their petition.

The distribution of the cash does not mean that the senior securities will receive additional cash as compensation, as pointed out in the opinion (145 F. (2) 299, 300). By the change in the effective date, they will obtain cash in lieu of the accumulated interest which would be payable in any event, even if the change as not made. It is a change by the substitution of cash in lieu of the issuance of new interest coupons which would be payable out of the same cash which is held in the treasury.

Under the "effective date" of the prior plan, the new securities would be issued as of January 1, 1939. The new First Mortgage Bonds bear interest at 4%, and the new General Mortgage Bonds bear interest at 4½%. All of the interest would be past due on the date of this issuance, and to avoid a default they would have had to be paid upon their issuance. It is evident, therefore, that whether interest is paid under the "effective date" of January 1, 1939, or the "effective date" of January 1, 1944, it would be paid in any event out of the cash on hand. Under no theory, therefore, would the Adjustment

Mortgage Bondholders (who stand as common stockholders under the approved plan) be materially affected as to the payment. If by the cash payment the senior securities receive in part the "additional compensation", according to their views, and the Adjustment Mortgage Bonds are not materially affected thereby, there is no reason why this class shall oppose the modified plan, and this Group therefore favored its adoption.

The change in the "effective date" from January 1, 1939, to January 1, 1944, is a change in the proper direction. It would be highly contrary to all reorganization principles to issue securities in 1945 as of January 1, 1939, with interest coupons that are past due, which may present the problem that the past due interest coupons are entitled to the payment of interest from the respective due dates. This would be avoided by the change in the "effective date". It would prevent the issuance of securities which on the face thereof would be in default at the date of their issuance under a plan bearing the approval of the Commission and the Court. Additional reasons appear in the report of the Commission in the Reorganization of the New York, New Haven & H. R. Co., 254 I. C. C., pp. 72-73.

The change in the "effective dates" was not jurisdictional. The Commission reacquired the jurisdiction when the case was remanded to it. The change in the "effective date" has not changed the capital structure. The Commission has held in numerous cases that it is proper to change the "effective date" even after it approved a reorganization plan when it reacquired jurisdiction on the failure to obtain the complete approval of its plan from the Court. (Florida East Coast Railway Reorganization, 252 I. C. C. 731; Denver & Rio Grande Western Railroad

Reorganization Finance Docket No. 11,002, June 14, 1943.) The right of the Commission to make changes was upheld in the decision of the Second Circuit of January 2, 1945, in the Reorganization of the *New York, New Haven & Hartford Railroad Co.*, not yet officially reported (Case No. 107, *supra*).

Not having raised the point that the additional compensation was not justified by the evidence, or that it was unfair and unreasonable, or that the plan is unfeasible, there was nothing to review on the appeal of the petitioners, except the fine points that we have discussed above, which were all adjudicated and foreclosed by the opinion and mandate of this Court.

Even if the Tenth Circuit should decide that the Commission was without authority to change the effective date, this point is unavailable to the petitioners because they did not raise this issue in their "statement of points". No matter how the Tenth Circuit will decide the case, it cannot conflict with the opinion in the instant case insofar as it relates to these petitioners. Therefore the application for the writ should be denied.

Respectfully submitted,

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ANSWER OF PETITIONER TO THE MOTION AND BRIEF, EACH DATED FEBRUARY 14, 1945, OF THE GROUP OF INSTITUTIONAL INVESTORS AND MUTUAL SAVINGS BANK GROUP

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February 26, 1945.

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The Motion and opposing Brief filed by the above named respondent Groups waiving service under Paragraph 3 of Rule 38 and asking this Court to consider and act adversely upon our Petition for *certiorari* without further printing gives a very incomplete and distorted picture.

Anyone reading this Motion would assume at once that it had been conceived in compliance with Paragraph 8 of Rule 38.

This Court is entitled to the facts.

Immediately after filing the Petition in this Court the petitioner's counsel applied to counsel for the respondent Groups for a stipulation under Paragraph 8 of Rule 38 which would eliminate from the printed record as in the category of non-essential matter everything certified by the District Court except "the reports and Order of the Interstate Commerce Commission and the opinion and decree of the District Court" which the respondent Groups had represented to the Circuit Court of Appeals to be the "basic" parts of the record certified by the District Court.

The respondent Groups not only declined so to stipulate but insisted on the printing of a great mass of immaterial matter and even complained that the record certified to this Court by the Circuit Court of Appeals was itself incomplete; whereupon, counsel for the petitioner wrote counsel for the Group of Institutional Investors as follows:

> "Enclosed is copy of an Order signed by Mr. Justice MURPHY extending the time of the Petitioner to perfect service under Paragraph 3 of Rule 38 of the Rules of the Supreme Court to March 1, 1945.
>
> "March 1, 1945 was fixed as the expiration date upon the assumption that you would obey the mandate of Paragraph 8 of Rule 38 and stipulate to omit from the printed record all matter not esesntial to a consideration of the questions presented by the Petition for the writ of *certiorari*.
>
> "This you have failed to do.

"Instead of stipulating to exclude all matter except 'the reports and order of the Interstate Commission and the opinion and decree of the District Court' which according to your representations to the Circuit Court of Appeals 'constitute the basic parts of the "short record" ' and 'show on their face that the District Court and the Interstate Commerce Commission acted in strict conformity with the opinion and mandate of the Supreme Court (318 U. S. 523)' you now insist on printing the elaborate transcript of the hearings in the Interstate Commerce Commission on July 20 and July 21, 1943.

"This transcript includes long arguments of counsel and evidence and other material relating to protracted controversies between the senior creditors whom you represent and the General Mortgage Bonds not included in your Group and known as the 'University Group of General Mortgage Bonds.' This transcript was not a document which you deemed essential in securing from the Circuit Court of Appeals a dismissal order which we seek to review.

"In this situation I think I am fairly entitled to apply to the Supreme Court of the United States for a further Order which (a) shall extend the time of the Petitioner for perfecting service under Paragraph 3 of Rule 38 for a period of thirty days from and after the decision of the Circuit Court of Appeals in the Tenth Circuit from the order approving and confirming the Commission's Plan for the reorganization of The Denver and Rio Grande Western Railroad Company, and (b) shall require that all expenses of printing the record be charged against the Group for whom you appear."

Upon receipt of this letter (but before any printing was undertaken) counsel for the Institutional Investors advised the Clerk of this Court that they would not relax their printing requirements and would oppose any further exten-

sion of time for compliance with Paragraph 3 of Rule 38. When this information was communicated to counsel for the Petitioner time was of the essence and accordingly authority was immediately given and funds were provided for all of the unnecessary printing exacted by the respondent Groups. This printing was well under way when the respondent Groups filed the motion to dispense with all printing and to accelerate consideration of the Petition in the hope as seems obvious of securing a denial of the writ before the Circuit Court of Appeals in the Tenth Circuit renders a crucial decision on the appeals in the proceeding for the reorganization of The Denver and Rio Grande Western Railroad Company. Since their motion to eliminate wasteful printing comes too late to serve a constructive purpose we think a conspicuously proper case is presented for charging the cost of all printing against these two respondent Groups in accordance with the spirit of Paragraph 8 of Rule 38.

We do not oppose prompt consideration of our Petition.

We do, however, urge that no adverse action be taken until the Circuit Court of Appeals in the Tenth Circuit renders its decision upon the pending appeals from the Order and Decree approving and confirming the Plan for the reorganization of The Denver and Rio Grande Western Railroad Company. *These appeals are set for final argument at Denver on March 13, 1945, and since the major underlying questions were rather fully argued at Wichita, Kansas, on November 13, 1944, an early decision which the respondent Groups seem so patently to dread may reasonably be expected.*

In addition to this very critical case in the Tenth Circuit an equally important case presenting the same basic questions, all of them questions of widespread interest and

national importance, is pending in the Circuit Court of Appeals in the Eighth Circuit on appeals from an Order or Decree approving a Plan for the reorganization of St. Louis Southwestern Railway Company.

The reorganization Plans for these two properties are of the same general pattern and are subject to the same basic infirmities as the Plan for the reorganization of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company. We wish here to feature only one point: all of these Plans were formulated in an economy which has ceased to exist and may not recur within the lifetime of any person now living. By reason of the changed economy the Plans can readily be shown no longer to be fair and equitable or to comply with Section 77.

We reproduce as Appendix A hereto the five major points presented to the Circuit Court of Appeals in the Eighth Circuit in a Brief dated January 26, 1945, filed by counsel for the Southern Pacific Company. It will be observed that here the dominant note is the fundamental change in economic conditions; and this, we think, the Circuit Court of Appeals in the Seventh Circuit failed to grasp in its true significance when in dismissing the Petitioner's appeal that Court said:

> "It is hardly within the range of possibility that Appellants could benefit thereby."

On the contrary we think it hardly within the range of possibility that the Petitioners would fail to secure 100% treatment instead of approximately 60% treatment for the Adjustment Mortgage Bonds if this proceeding is sent back to the Commission with a direction that effect be given to existing economic conditions. We think such a revision of the Plan would be imperative as the result of numerous factors, only one of which we will now emphasize; this single factor is the revolutionary change since

the decision of this Court rendered March 15, 1943, in rates for the hire of money.

All three of the Plans we are now considering were formulated upon the theory (perhaps then a correct theory) that money secured by a senior rail lien was worth not less than 4%. Accordingly all three of these Plans provides for a 4% First Mortgage although today 3% is closer to a prevailing rate which is continuing to decline to even lower levels. If recognition is given to this single factor at least 25% more income can be made to flow through to junior lienors. We attach hereto as Appendix B a list of recent refunding operations showing in each case interest savings approximating if not exceeding 25%. This is but one phase of a new economy which renders these three Plans (and all others on the same pattern) obsolete.

Would it not be morally wrong to construe the mandate of this Court as permitting, much less requiring, the Interstate Commerce Commission and the District Court to blind themselves to the fact that the Plan for the Debtor's reorganization has ceased to be fair and equitable and to comply with the requirements of Section 77? We think this Court will find the answer in the time honored maxim that: "Equity abhors a forfeiture." Perhaps this Court may spell out the same answer in the following extract from the dissent of the late Joseph B. Eastman in the proceeding for the reorganization of St. Louis Southwestern Railway Company. Referring to the manifestation as early as 1941 of greatly increased earning power Chairman Eastman said:

> "While I agree that such earnings, produced by the extraordinary conditions created by the national defense program, cannot be regarded as a sound criterion for the future, nevertheless they may well give pause for reflection before a reorganization plan is approved which wipes out all of the existing

> stock and part of the existing indebtedness. Furthermore, they show that a delay in reorganization now will not involve the constant accumulation of claims for accruing and unearned interest, which has been so serious a consequence of delay in the past."

In the light of all of the foregoing and in view of the fact that a full record is being printed through the insistence of the respondent Groups we respectfully make the following suggestion:

That this Court forthwith through its issue of the *writ* of *certiorari* remand this proceeding to the Circuit Court of Appeals in the Seventh Circuit with directions to reinstate and to hear the merits of the appeals which it dismissed by its Order of October 31, 1944.

While those appeals are being matured for argument the Circuit Courts of Appeal in the Tenth Circuit and the Eighth Circuit may be expected to decide the questions presented to them in the proceedings for the reorganization of The Denver and Rio Grande Western Railroad Company and St. Louis Southwestern Railway Company. It may well be that all three Circuits will be in accord as to the proper disposition of these substantially identical cases; if so that in all probability would end the matter. If a conflict should arise this Court may then wish to say the final word.

All of which is most respectfully submitted.

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February 26, 1945.

[APPENDICES FOLLOW]

APPENDIX A

Major Points in Brief of Southern Pacific Company filed in United States Circuit Court of Appeals for the Eighth Circuit on appeals from Order approving a Plan of Reorganization for St. Louis Southwestern Railway Company.

ARGUMENT.

I.

It has been authoritatively established that a court in determining whether it should approve a plan of reorganization for a railroad, certified by the Commission under § 77 of the Bankruptcy Act, Title 11, U. S. C. A. § 205, should consider the conditions existing at the time of its decision and determine whether the change in condition, since the action of the Commission has been so great as to require the plan to be returned to the Commission for reconsideration.

II.

An appellate court, in determining whether conditions have changed since the certification of a plan by the Commission so as to require the reversal of a judgment below approving the plan, may properly consider:

(a) Any matter before the District Court set forth in the printed record;

(b) Any matter which the Court below was bound to notice, as if contained in the record;

(c) Any matter occurring since the decision below presented by concession of counsel or by any satisfactory evidence;

(d) Matters judicially noticed as within the field of common knowledge.